

NOT FOR PUBLICATION

NO. 24593

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOSEPH RITA, SR., Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR NO. 95-147)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Joseph Rita, Sr. (Rita) appeals, *pro se*, the September 5, 2001 findings of fact, conclusions of law and order (the September 5, 2001 order) of the circuit court of the fifth circuit¹ that denied, without a hearing, Rita's January 31, 2001 motion to correct illegal sentence, which was expressly premised upon Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (West 2001) (the HRPP Rule 35 motion);² and Rita's one-sentence *ex parte*

¹ The Honorable George M. Masuoka, judge presiding.

² Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (West 2001) provided:

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not

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motion to release petitioner from custody ("Petitioner hereby respectfully requests to be released from custody due to wrongful conviction upon the exculpatory evidence of DNA in the above-numbered case."), dated April 6, 2001 but filed September 6, 2001. Rita's March 22, 2001 "reply brief" below, and Rita's April 17, 2001 addendum to his HRPP Rule 35 motion, raised additional issues and arguments supporting the two motions.

The issues that were raised by Rita in the foregoing four filings are all, save for one, summarized in Rita's opening brief on appeal as his points of error:

1. The Fifth Circuit Court failed to recognize the DNA findings presented to the court on February 23, 1996, which vindicated [Rita] as the suspect of which he stood accused.

2. The Prosecuting Attorney had been in the possession of the DNA report prior to [Rita's] pleading no contest, but still hid said DNA findings from the defense, as well as the accused, and convicted him of rape, even so he perfectly knew, that [Rita] was innocent of the charges brought against him. Had these DNA findings be [sic] made known prior to conviction, the outcome of this case would have been different.

3. Conviction had been achieved by coercing [Rita] into signing a Rule 11 plea-agreement, with the understanding, in the event [Rita] would not sign [sic] said plea-agreement, he would be send [sic] to prison for a duration of up to 150 years.

4. Ineffective Assistance of Defense Counsel, for failing to investigate case and bring to light the **Exculpatory** evidence in the hand of the Prosecuting Attorney in the form of said DNA report.

5. Prosecutorial Misconduct for failing to adhere to Court Rules of Ethical Behavior and present **Exculpatory** Evidence to the Attorney presenting [Rita], as well as [Rita].

²(...continued)

deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

(Bold typesetting and some brackets in the original). The issue not argued by Rita in his appellate briefs was the original issue presented in his HRPP Rule 35 motion:

The issue at bar deals with the wrong convictions according to the Grand Jury Indictments issued on September 18, 1995. In the Indictment [Rita] was charged with the Assault of an adult [sic] in Cr.No. [sic] 95-0147 when indeed the person mentioned by name[, Complainant A,] is [Rita's] niece [sic], a minor child. Yet, the mother of this child[, Complainant B,] was the person mentioned in CR.NO. [sic] 95-0148, and [Rita] was convicted of incest on a adult [sic].

(Some brackets in the original).³

We affirm.

I. Background.

The issues and arguments raised by Rita in this appeal attack his no contest plea and conviction in the underlying Cr. No. 95-0147, and his no contest plea and conviction in the companion case, Cr. No. 95-0148. The two cases involved events in 1993 and 1995, respectively. In the former case, the State alleged that Rita engaged in nonconsensual sexual intercourse with his niece's daughter, Complainant A, who was less than fourteen years old at the time. In the latter case, the State alleged that Rita engaged in nonconsensual sexual intercourse with the niece, Complainant B.

³ Here, Rita labors under misapprehensions of fact and law that are readily apparent. See Section I, Background, infra.

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In Cr. No. 95-0147, Rita was indicted on September 18, 1995 for kidnapping (Count I), sexual assault in the first degree (Count II), burglary in the first degree (Count III), kidnapping (Count IV) and sexual assault in the first degree (Count V). As part of a plea agreement in which the State dismissed all other counts of the indictment, Rita on March 27, 1996 pled no contest to the reduced charge of sexual assault in the second degree (Hawaii Revised Statutes (HRS) § 707-731(1)(a) (1993)) in Count II. On June 13, 1996, judgment was entered, in which the court sentenced Rita to a ten-year indeterminate term of imprisonment.

In Cr. No. 95-0148, Rita was indicted on September 18, 1995 for burglary in the first degree (Count I), sexual assault in the first degree (Count II), incest (Count III), criminal contempt of court (Count IV) and sexual assault in the third degree (Count V). As part of a plea agreement in which the State dismissed all other counts of the indictment, Rita on March 27, 1996 pled no contest to incest (HRS § 707-741(1) (1993)) in Count III. On June 13, 1996, judgment was entered, in which the court sentenced Rita to a five-year indeterminate term of imprisonment, to run consecutively to the ten-year term imposed in Cr. No 95-0147.

Rita did not appeal either judgment. Post-judgment below, Rita proceeded *pro se*.

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HRS § 707-731(1)(a) provides that "[a] person commits the offense of sexual assault in the second degree if: The person knowingly subjects another person to an act of sexual penetration by compulsion[.]" (Enumeration omitted; format modified.) "Compulsion" means, *inter alia*, "absence of consent[.]" HRS § 707-700 (1993). Sexual assault in the second degree is a class B felony, HRS § 707-731(2) (1993), which carries a ten-year indeterminate term of imprisonment. HRS § 706-660(1) (1993).

HRS § 707-741(1) provides that "[a] person commits the offense of incest if the person commits an act of sexual penetration with another who is within the degrees of consanguinity or affinity within which marriage is prohibited." Marriage is prohibited between an uncle and his niece. HRS § 572-1(1) (1993). Incest is a class C felony, HRS § 707-741(2) (1993), which carries a five-year indeterminate term of imprisonment. HRS § 706-660(2) (1993).

HRS § 706-668.5 (1993) provides:

(1) If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.

(2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.

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II. Discussion.

Insofar as Rita's HRPP Rule 35 motion is as it expressly purports to be, an HRPP Rule 35 motion, the court's September 5, 2001 order must be affirmed, because Rita's motion and its related filings challenged his no contest pleas and convictions but did not in any way question the legality of the sentences imposed, as comprehended under HRPP Rule 35. Rita did not question the conformity of the sentences to statute, State v. Fry, 61 Haw. 226, 229, 602 P.2d 13, 16 (1979), the constitutionality of the sentences, State v. Kido, 3 Haw. App. 516, 522-23, 602 P.2d 1351, 1356 (1982), or the authority of the court to impose the sentences. State v. Kahalewai, 71 Haw. 624, 626, 801 P.2d 558, 560 (1990).

Conceivably, Rita's HRPP Rule 35 motion could be construed as an HRPP Rule 40 motion.⁴ See HRPP Rule 40(c)(2) (in

⁴ HRPP Rule 40(a)(1) provides:

At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

- (i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawaii;
- (ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;
- (iii) that the sentence is illegal;
- (iv) that there is newly discovered evidence; or
- (v) any ground which is a basis for collateral attack on the judgment.

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pertinent part, "[w]here a post-conviction petition deviates from the form annexed to these rules, it shall nevertheless be accepted for filing and shall be treated as a petition under this rule provided that the petition claims illegality of a judgment" (enumeration omitted)). As such, however, it could support neither proceedings nor relief, because "the issues sought to be raised have been previously ruled upon or were waived." HRPP Rule 40(a)(3) (West 2001).⁵

On October 18, 1999, in S.P.P. No. 99-0005, Rita filed an HRPP Rule 40 petition for post-conviction relief in regards to Cr. Nos. 95-0147 and 95-0148 (the HRPP Rule 40 petition). On December 1, 1999, the court denied Rita's HRPP Rule 40 petition. Rita appealed, but on April 28, 2000, the supreme court filed a summary disposition order that affirmed the court's denial of

⁴(...continued)

For the purposes of this rule, a judgment is final when the time for direct appeal under Rule 4(b) of the Hawai'i Rules of Appellate Procedure has expired without appeal being taken, or if direct appeal was taken, when the appellate process has terminated, provided that a petition under this rule seeking relief from judgment may be filed during the pendency of direct appeal if leave is granted by order of the appellate court.

⁵ HRPP Rule 40(a)(3) (West 2001) provided:

Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

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Rita's HRPP Rule 40 petition, the judgment on appeal following on June 9, 2000.

In connection with his HRPP Rule 40 petition, Rita raised each and every issue he later adduced in his HRPP Rule 35 motion and its related filings, including the touchstone DNA issue, but save for the issue regarding the purportedly defective indictments. Hence, to the extent "the issues sought to be raised" in Rita's HRPP Rule 35 motion and its related filings "have been previously ruled upon" in connection with his HRPP Rule 40 petition, "proceedings [were] not available and relief thereunder [could] not be granted" upon Rita's HRPP Rule 35 motion and its related filings. HRPP Rule 40(a)(3). To the extent the same issues were not previously ruled upon, and including the issue regarding the purportedly defective indictments, they clearly "could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under [HRPP Rule 40]," and were thus waived. HRPP Rule 40(a)(3). There is nothing in the record that in any way indicates, with respect to any of the same issues, that Rita's "failure to appeal a ruling or to raise an issue [was other than] a knowing and understanding failure." Id. Nor is there anything in the record that remotely suggests "the existence of extraordinary circumstances to justify [Rita's] failure to raise the issue." Id.

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III. Conclusion.

For the foregoing reasons, the court's September 5, 2001 order is affirmed.

DATED: Honolulu, Hawai'i, January 14, 2004.

On the briefs:

Joseph Rita, Sr.,
defendant-appellant, *pro se*.

Acting Chief Judge

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai,
for plaintiff-appellee.

Associate Judge

Associate Judge